number of costs assigned to other cost categories. For example, its decision not to include food and utility costs in the program operating cost category is appropriate. While it could be argued that those are program costs, the proposed rule is designed to encourage facilities to reduce administrative costs and to limit increases in maintenance costs. The Department has decided that foods costs and utility costs should be subject to those limitations in order to prevent excessive increases in those costs. Its determination is necessary and reasonable and the provisions in subpart 1, as amended, are necessary and reasonable and may be adopted. Also, the amendments made were not substantial for purposes of Minn. Rule 1400.1100 (1985).

9553.0040, subp. 2, Maintenance Operating Costs.

93. This subpart lists the costs that must be included in the facility's maintenance operating cost category. They include the direct cost of dietary services; laundry and linen services; housekeeping services; plant operations and maintenance services; and payroll taxes and fringe benefits allocated according to other provisions of the rule. The specific costs included in this cost category under the rules proposed by the Department are necessary and reasonable and may be adopted, subject to the comments at Finding 67.

9553.0040, subp. 3, Administrative Operating Costs.

94. This subpart lists the costs that must be included in the administrative operating cost category. The costs included within this cost category generally relate to the overall administration of ICF/MRs. They include: business office functions; office supplies; salaries and wages for administrative personnel; professional fees for legal and accounting services; business meetings and seminars; postage; training costs and related expenses; membership fees for professional associations; subscriptions to periodicals directly related to the operation of the facility; advertising and personnel recruitment costs; and other similar expenses including the allocated portion of central, affiliated or corporate office costs. The inclusion of these costs is necessary and reasonable.

If the costs actually incurred in each of the operating cost categories proposed by the Department were reimbursed in the same manner, the assignments of costs to these various categories would be rather academic. However, under the rules proposed by the Department, administrative operating costs are not fully reimbursed and both maintenance and administrative costs are limited to fixed annual percentage increases. Thus the assignment of costs to the administrative operating cost category is important because the costs incurred in that cost category may not be fully reimbursed. Therefore, costs which the Department proposes to include in this cost category must be considered in light of those limitations.

9553.0040, subp. 3, item F.

95. As originally proposed, all insurance costs incurred by a facility were to be assigned to the administrative cost category. However, those costs are not controllable by providers. The Department has determined, therefore, that they should not be subject to the limitations otherwise applicable to administrative costs. Therefore, the Department has included real estate insurance and professional liability insurance in a special operating cost

category, and this item has been amended to reference that change. As amended, this item is necessary and reasonable and the amendment proposed does not constitute a substantial change for purposes of Minn. Rule 1400.1100 (1985).

9553.0040, subp. 3, item H.

96. Under this item, the costs of the professional services of lawyers, accountants, and auditors as well as the cost of data processing services are required to be assigned to the administrative operating cost category. Several persons objected to such an assignment. They noted, for example, that if a facility's challenge of an agency's decision is succussful, all the fees incurred by the facility should be reimbursed. It was also argued that it is inappropriate to include the costs a facility will incur to prepare an additional cost report in the phase-in period and the additional costs involved in changing fiscal years in this cost category.

The Department's decision to include accountant's fees in the administrative cost category is necessary and reasonable as proposed. Although providers are required to prepare an additional cost report for the calendar year ending December 31, 1985, as is discussed in more detail, infra, those costs are allowable. Since, the rule does accord uniform treatment to all providers, it is necessary and reasonable as proposed. Inclusion of legal fees in that category may have the practical effect of limiting some providers ability to recover those fees even when their challenges are successful. If providers had a legal entitlement to recover the attorney's fees incurred, limiting them in the manner proposed by the Department might be a questionable practice. However, the Administrative Law Judge is not aware of any law which creates such a right and none were cited by industry commentators. The usual rule is that prevailing parties in administrative cases do not have an entitlement to attorney's fees, costs, or disbursements in the absence of a specific statute allowing them or an agreement to that effect. There is a corollary rule that generally exempts state agencies from being taxed with a litigants attorney's fees, costs or disbursements. Consequently, while the Department has made successful challenges an allowable cost, that allowance is subject to a proviso that they will not cause the limitations on administrative operating costs to be exceeded. That policy decision was not shown to be inconsistent with the legal rights of providers and it is concluded, therefore, that the rule is necessary and reasonable as proposed.

9553.0040, subp. 3, item P.

97. Under this item, that portion of the preopening costs incurred more than 30 days before a facility is open must be amortized over a five-year period. Although preopening costs have been logically assigned to the administrative cost category, given the limitations imposed on that category under Part 9553.0050, subp. 1, item A, subitem (1), it is concluded that such an assignment is not necessary and reasonable. The limitation on administrative costs is a median which is calculated by looking at the administrative costs of all facilities. A facility that must incur costs that other facilities do not have, will necessarily be prejudiced. If that facility would, but for its preopening costs, be within the limitation, it would be prejudiced by having its preopening costs disallowed. As such, this provision violates the provisions of Minn. Stat. § 14.14, subd. 2 (1984). To

correct this defect, the preopening costs of a facility must be assigned to the special operating cost category created by the Department.

9553.0040, subp. 3, item U.

98. Under this item, central, affiliated or corporate office costs, excluding the property-related costs of capital assets used exclusively by individual facilities for purposes of part 9553.0030, subp 4, item D, are included within the administrative operating cost category. Ms. Rowland and others objected to this classification. She argued, for example, that many facilities do not have an option when it comes to establishing a central office, as the Department had argued, because many of them have six beds and those facilities -- which are essentially homes -- do not have room for an office. She also noted that having an office in small facilities detracts from their home-like atmosphere. She argued that small facilities that cannot have an office on the premises should not be treated differently than facilities that have room for them. These objections are not persuasive. Providers are not required to have central offices. On the contrary, it is a business decision they make considering the size, design and location of their facilities and the number of facilities they own. The business decisions made have a cost impact that the Department may reasonably consider and limit. Moreover, it is concluded that the Department can reasonably treat central office costs differently from the "costs" of on-site office space. The cost of having a central office would necessarily be substantially higher than the cost of using some existing space on the premises of a small facility or some existing space in a larger, older facility. Given the manifest differences between the two situations, it is concluded that the Department's decision to include central office costs in the administrative cost category and subject them to the limitations on administrative costs is necessary and reasonable. Likewise, its decision not to attempt to identify or limit the costs of on-site office space is permissible. The Department could reasonably conclude that the use of existing space on the premises of a facility has little or no cost impact that can be effectively limited.

9553.0040, subp. 4, Payroll Taxes and Fringe Benefits.

99. This cost category includes the employer's share of the social security withholding tax; state and federal unemployment compensation taxes and costs; group life insurance and disability insurance; group health and dental insurance; worker's compensation insurance; pension or profit sharing plans; and governmentally required contributions. All these costs must be allocated to other cost categories in accordance with the provisions of part 9553.0030, subp. 6, discussed above. The provisions of this subpart are necessary and reasonable and may be adopted.

9553.0040, subp. 5, Property-related Costs.

100. The property-related cost category includes a depreciation allowance for capital assets except land; capital debt interest expenses; rental and lease payments; and payments made in lieu of real estate taxes meeting the criteria set forth in part 9553.0036, item BB. The Department has deleted special assessments paid and accrued real estate taxes as well as license fees

required by the Department of Human Services and the Department of Health and included them in the new special operating cost category as suggested at the hearing. As amended this subpart is necessary and reasonable and may be adopted. The amendements made do not constitute substantial changes for purposes of Minn. Rule 1400.1100 (1985).

9553.0040, subp. 6, Special Operating Costs.

101. In response to public comments requesting a separate cost category for operating costs over which facilities have no control and requesting special treatment of those costs to provide full reimbursement, the Department proposes to add a new special operating cost category which will consist of special assessments and real estate taxes, license fees required by the Minnesota Department of Human Services and the Minnesota Department of Health, real estate insurance and professional liability insurance. The addition of subpart 6, and the costs to be included in the special cost category it creates, was shown to be a necessary and reasonable procedure for dealing with costs over which facilities have little control. Since the amendment resulted from discussions at the hearing it does not constitute a substantial change for purpoes of Minn. Rule 1400.1100 (1985). ARRM generally supported this change in the rule but argued that it should be expanded to include the second cost reports that must be prepared by facilities during the phase-in period, the amortization of preopening costs, and certified audit costs. Its arguments have been addressed in other parts of this Report and need not be considered further here.

GENERAL REPORTING REQUIREMENTS

9553.0041, subp. 1, Required Cost Reports.

102. Under this item each provider is required to submit a cost report to the Department no later than March 31 covering the reporting year ending the prior December 31. If a certified audit has been prepared, it must be submitted with the cost report. A provider or provider group having 48 or more licensed beds must, however, submit a certified audit of its financial records with its cost report. The audit must be obtained from an independent certified public accountant or licensed public accountant and be conducted in accordance with the generally accepted auditing standards referenced in the rule. Facilities owned by a governmental agency may comply with the auditing requirements by submitting the audit prepared by the state auditor.

As is discussed in other parts of this Report, the Department's decision to establish uniform rate and reporting years was subject to a great deal of criticism. In addition, the auditing requirements in this rule for providers or provider groups having 48 or more beds was criticized. The providers noted that obtaining a first-time certified audit for the reporting year ending December 31, 1985 could cost as much as $15,000. Moreover, they noted that changing their reporting years under the rule would, as a practical matter, require them to change their fiscal years. Changing fiscal years requires the approval of the Internal Revenue Service and requires the preparation and filing of short period financial statements, reports and tax returns. They also noted that an additional cost report will be required to be filed for 1985 so that the new rule can be phased-in. None of these costs are recognized in the historical cost figures contained in the base used to

compute the facilities' reimbursement rates for 1985 or the first nine months of 1986. It was also argued that requiring audits of facilities with more than 48 beds is an arbitrary distinction and that requiring audits is inconsistent with the legislative directive to reduce and limit administrative costs. Mr. Furlong noted, for example, that field audits are sufficient to discover any fraud that might exist. In spite of these criticisms, the rule proposed is necessary and reasonable. The Department has determined that a provider or provider group operating 48 or more beds is an operation of sufficient complexity to require an audit to assure a proper accounting of public funds. Certified audits will assist the Department in performing its own audit functions and help the Department administer the expenditure of public funds. Determining the 48 cut-off point necessarily involves the expertise of the Department and its familiarity with the complexities involved. Its legislative decision in this case is necessary and reasonable. The problems created by the rule in terms of increased costs which may not be built into the facility's rates during the period in which they will be incurred is discussed elsewhere. The procedures the facilities must follow are a distinct issue from the manner in which necessary costs are reimbursed. However, the March 31 date on page 30, line 7 is inconsistent with the April 30 deadline established in other parts of the rule. This must be amended to be consistent with them.

9553.0041, subp. 2, Required Information.

103. This part sets forth the components required of a complete cost report that must be filed each year. Facilities must provide the information, statistical data, and historical operating cost information with the supporting worksheets and calculations requested on the cost report form. In addition, the cost report must include a balance sheet and income statement for each facility that is not required to file an audited financial statement. Where audited financial statements are required they must include a balance sheet and income statement, statement of retained earnings, statement of changes in financial position, and the certified or licensed public accountant's opinion. Such provisions are necessary and reasonable. However, the rule also requires that the audit be accompanied with "appropriate notes to the financial statements" and "any applicable supplemental information". What notes are "appropriate", and what supplemental information is "applicable" is not defined nor discussed in the Department's SNR. Consequently, it is concluded that the two quoted requirements are not sufficiently specific for purposes of Minn. Stat. § 14.02, subd. 4 and constitute a substantive violation of law for purposes of Minn. Stat. § 14.50. If some notes or supplemental information other than that which would be required of an audit conducted in accordance with generally accepted auditing standards is required to be submitted that information must be listed with more specificity. It not, to correct this defect, the provisions quoted above must be deleted.

The Department has also proposed an amendment to item C clarifying the nature of the audited financial statement required. If the financial statements submitted are not sufficiently detailed, or if the facility's fiscal year is different from its reporting year, the facility must provide supplemental information that reconciles costs on the financial statements with the cost report. The intent of the amendment is to make it clear that facilities are not required to change their fiscal year and to eliminate the

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requirement for two audits if such a change is not or cannot be made. Item C, as amended, is necessary and reasonable and the amendment made clarifying the facility's obligations under the rule does not constitute a substantial change for purposes of Minn. Rule 1400.1100.

9553.0041, subp. 2, item I.

104. The annual cost report must also include copies of leases and all other documents related to the lease of the physical plant and land, or a signed statement indicating that no changes have been made in the documents on file with the Commissioner. Lease documents must include information on the historical capital cost of the physical plant and land, and a detailed set of cost information from the lessor. Mr. Furlong argued that this is an unreasonable and unnecessary requirement because a provider may have no way of forcing a third-party lessor to provide the information required under the rule. In spite of the objections made to the rule, it is necessary and reasonable. The record shows that the Department must have the information required by this part. Cost information from lessors is required under the rule so that the Department can determine whether the lease is cost-effective. If the property leased is sold or refinanced by the lessor, lease costs may increase. In the Department's view such cost increases result in the circumvention of the provisions in part 9553.0060 (which determine the payment rate for property costs) and violate the intent of the Deficit Reduction Act of 1984, section 2314 (DeFRA). This is a necessary and reasonable provision.

The LAC Report mentioned several problems with the reimbursement of lease costs under Rule 52. They included the lack of state control over costs, undisclosed leasing arrangements and noncompliance with generally accepted accounting principles. Since leases are generally more expensive than purchases, and in view of the factors mentioned above, it is concluded that these provisions may be adopted. Facilities will be obligated to make sure their leases include provisions making the necessary information available.

Ms. Martin argued that the primary problem with the rule is that the Department may apply it retroactively. The rule does not state that it is intended to apply to leases which have already been negotiated. Therefore, that issue need not be decided here. It is a valid prospective rule. If the Department does attempt to apply it in a retroactive manner, the validity of its action can be resolved at that time.

9553.0041, subp. 2, item K.

105. With its annual cost report a facility must submit staff assignment charts classified to the cost categories in the rule. Dick Lanigan, a certified public accountant, requested further clarification of the nature of the charts required. In its post-hearing comment, the Department noted that the cost report form providers are required to use specifies the staff positions which must be reported. Therefore, it has proposed no clarifications to the rule. Even if the cost report specifies the staff positions which are covered by the rule, the kind of information to be submitted regarding those positions is still impermissibly vague for purposes of Minn. Stat. § 14.02, subd. 4. This constitutes a substantive violation of the Administrative Procedure Act for purposes of Minn. Stat. § 14.50 (1984). To correct this defect, the Department must either specify the kind of

information that must be submitted under this rule, or if all the information needed by the Department is clearly set forth the cost report, it can correct the defect by referencing that fact. For example, it could add another sentence to this item to state: "The charts must contain the information specified in the cost report form."

9553.0041, subp. 3, Supplemental Reports.

106. In addition to information that must be submitted with a provider's annual cost report, this subpart lists additional information the Commissioner may require a provider to submit in order to substantiate the payment rate. Under item A, the Commissioner may require a facility to submit separate, certified audited financial statements -- if they have been prepared -- for each related organization in the provider group, if more than $1,000 of the related organization's costs are included within the facility's cost report. If a certified audited financial statement is not available when requested by the Commissioner, an unaudited financial statement must be submitted. The financial statement required must include a balance sheet, income statement, statement of retained earnings, statement of change in financial position, appropriate notes to the financial statements, and any applicable supplemental information. The provisions of this subpart are necessary and reasonable. However, as noted before, the language requiring "appropriate notes to the financial statements, and any applicable supplemental information" must be clarified or deleted. (See Finding 103.)

Jonathan R. Lokhorst, a certified public accountant, argued that many small facilities do not prepare financial statements with full disclosure and requiring them to do so would unnecessarily increase their costs. Therefore, he recommended that the unaudited financial statements be required to include only a balance sheet and an income statement. Under Minn. Stat. § 256B.27, the Commissioner has broad authority to require reports, information and audits from providers. Agencies with such power may generally require any relevant information to be submitted. Therefore, it is concluded that the provisions in item A are within the scope of the Commissioner's authority and that they are necessary and reasonable. However, if all the information specified will not be needed in every case, the Department should consider making the submission of any information other than the financial statements discretionary with the Commissioner rather than mandatory. For example, the words "Financial statements must" (pg. 33, line 8) could be replaced with: "The Commissioner may also require that the financial statements....".

9553.0041, subp. 3, item C.

107. Under this item the Commissioner may require a provider to submit copies of leases and other documents related to the lease of depreciable equipment, furnishings and goods. The lease documents must include information on the historical capital cost of the items leased and the information contained in subpart 2, item D, as paid by the lessor. Under item D, a lessor would be required to submit a list of its capital debts and working capital loans outstanding for each leased item for the reporting year, the name of the lender, the terms of the debt, the interest rate of the debt, interest and principle payments for the current year, and the original amount of each debt. Mr. Lanigan argued that it is unlikely that lessors will be willing or able to provide the annual information relating to their debt

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interest rate as required under this rule and that providers should not be required to furnish it. The need and reasonableness of this item was established by an affirmative presentation of facts for purposes of Minn. Stat. § 14.14, subd. 2 (1984). It its post-hearing comments regarding part 9553.0041, subp. 2, item I, the Department noted that this kind of information is essential to determine whether a lease is cost effective. Since lease costs may increase as a result of the sale or refinancing of the capital asset by the lessor, such transactions could be used to circumvent the provisions in part 9553.0060. Those arguments are persuasive for the reasons mentioned previously. However, the Department should consider exempting leases of insignificant amounts from this requirement.

9553.0041, subp. 3, item D.

108. Under this item the Commissioner may have access to the federal and state income tax returns of an individual, provider, or provider group having an ownership interest in a facility. Several persons criticized this provision. Mr. Lokhorst argued that it is an absurd authorization and that Departmental staff should not be able to arbitrarily pry into the personal financial affairs of private citizens. Mr. Furlong made similar arguments. He noted that one of the fears of providers is that such tax forms could become part of a public file. He noted that the Department has the ability to get the same information through its field audit, and in suspected cases of fraud would be able to subpoena the tax forms.

In its post-hearing comments, the Department noted that it did not want copies of tax returns for its files but merely wanted access to them, if necesssary, for purposes of verifying information in the providers' cost reports during the field audit process. The courts have repeatedly held that tax returns may be obtained from a taxpayer through discovery or during an agency investigation. See, e.g., St. Regis Paper Co. v. United States, 368 U.S. 208, 218-229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961); United States v. Sheriff, City of New York, 330, F.2d, 100, (2d. Cir. 1964); O'Sullivan v. Saperston, 587 F.Supp. 1041 (S.D.N.Y. 1984); United States v. O'Mara, 122 F.Supp. 399 (D.D.C. 1954); Heathman v. United States Dist. Ct. Cent. Dist. of Cal., 503, F.2d. 1032 (9th Cir. 1974)). However, the power to examine federal tax returns is not unlimited and particularly where the returns of individuals are involved, the privacy interests of taxpayer may outweigh the Department's interests in a particular case, thereby making an examination of the tax returns or parts of them inappropriate. Bergman v. Senate Special Committee on Aging, 389 F.Supp. 1127 (S.D.N.Y. 1975). In that case, the Court enjoined a bank from fully complying with a Congressional subpoena because the subpoena ordered the production of purely personal financial matters which were unrelated to the nursing home activities under investigation. In any case where a taxpayer objects to providing access under the rule, the taxpayer or the Department may have the objection resolved in the courts. Since such a review procedure exists and since the rule is otherwise authorized, it may be adopted.

9553.0041, subp. 3, item E.

109. Under this item, other relevant information required to support a payment rate must be submitted to the Department at the Commissioner's request. Mr. Lokhorst argued that since the word "relevant" is not defined,

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the rule leaves too much discretion to Departmental personnel and should be deleted. Mr. Lanigan also argued that this provision is too broad given the penalities proposed for noncompliance with information requests under the rule. Nonetheless, it is concluded that the rule is necessary and reasonable as proposed. It is not feasible to list or to define all the types of information that may be necessary to support a payment rate in every situation. There must be a catchall provision which can be used to obtain information needed when that information is not specified. The provision used by the Department is not overly broad for that purpose. It is in a supplmental reporting section and limits the information that must submitted to that which is relevant and only when that relevant information is "required" to support a payment rate. In most cases, additional information will not be required to support a payment rate for purposes of the rule. However, in some unusual situations, additional information may be required. This rule only covers those situations and it may be adopted.

9553.0041, subp. 4, Method of Accounting.

110. This subpart provides that the accrual method of accounting in accordance with generally accepted accounting prinicples is the only acceptable method of accounting for purposes of satisfying the reporting requirements in these rules. It permits governmentally owned facilities to use a cash or modified accrual method of accounting if they show that the accrual method is not applicable to them. This is a necessary and reasonable provision. Under Minn. Stat. § 256B.501, subd. 3(c), the Commissioner is required to include requirements to ensure that the accounting practices of ICF/MRs conform to generally accepted accounting principles. Under Minn. Stat. § 14.05, subd. 4, agencies do have authority to grant variances from the provisions of their rules and the Commissioner proposes to make variances available to local governmental units operating ICF/MRs if they have adopted methods other than the accrual method, and if they demonstrate that another method more accurately reflects their actual financial operations. Granting variances to local governmental units to obtain a more accurate cost picture for ratesetting purposes is necessary and reasonable and within the scope of the Commissioner's authority under the statute cited above.

9553.0041, subp. 5, Records.

111. This subpart requires the provider to maintain the statistical and accounting records required under this part in sufficient detail to support the five most recent annual cost reports submitted to the Commissioner. Like part 9553.0035, subp. 5, item A(5), this part was amended to clarify its meaning. As amended, it is necessary and reasonable. The amendment does not result in a substantial change for purposes of Minn. Rule 1400.1100 (1985).

9553.0041, subp. 8, Deadlines, Extensions and Rejections.

112. Item A of this subpart requires that the annual cost report for the reporting year ending each December 31 be filed with the Department by the following April 30. Originally the Department proposed a March 31 reporting date and procedures for obtaining a one-month extension of that deadline. However, ARRM representatives suggested that the language originally proposed would generage unnecessary extension requests. Consequently the Department

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now proposes to adopt an April 30 deadline. The rule, as amended, is necessary and reasonable and the amendment proposed does not constitute a substantial change for purposes of Minn. Rule 1400.1100 (1985).

9553.0041, subp. 8, item B.

113. Under this item the Commissioner is authorized to reject incomplete and inaccurate reports and require a facility to provide any additional information necessary to support the payment rate requested in the cost report. If the corrected report or the additional information requested is not filed within 20 days of the request the report must be rejected. The rule provides that the Commissioner "may" extend the 20-day time period if the facility makes a showing of good cause in writing and the Commissioner determines that the delay will not prevent him from establishing a timely payment rate. It is necessary and reasonable to authorize the Commissioner to reject inaccurate or incomplete cost reports or to make requests for additional information necessary to support the payment rate. The 20-day time period required for compliance is also necessary and reasonable since extensions can be obtained upon a showing of good cause. However, the language governing the approval of extensions violates the provisions of Minn. Stat. § 14.05, subd. 1, because it gives the Commissioner unfettered discretion in granting or refusing to grant extensions meeting the criteria set forth in the rule. This constitutes a substantive violation of law for purposes of Minn. Stat. § 14.50 (1984). To correct this defect, the sentence beginning on page 34, line 32 and ending on line 36 must be amended to read as follows:

> Upon a showing of good cause in writing the commissioner shall extend the 20-day deadline if the delay requested by the facility will not prevent the establishment of timely rates.

114. Item B also provides that the failure to file the required cost report and the failure to correct the form of an incomplete or inaccurate report shall result in its rejections and in a reduction of the payment rate as specified in subpart 10 (discussed below). For a facility's failure to provide additional information necessary to support the payment rate request, the providers' rates must also be reduced as specified in subpart 10, unless the total payment rate can be calculated by the disallowance of the cost for which the information was requested, in which case no reduction under subpart 10 may occur. Except as noted below, these are necessary and reasonable requirements to ensure that the Department is reimbursing providers at an appropriate level. However, it is recommended that the Department reconsider its use of the word "additional". Apparently the "additional" information the Department has in mind in item B is the "supplemental" information listed in subpart 3, as the latter rule would cover any other information request. If that is the case, the word "supplemental" should be used, and the words "necessary to support the payment rate request" (pg. 34, lines 28-29) could be

[redacted]